No. 13004

IN THE

United States
Court of Appeals
For the Ninth Circuit

RAOUL A. COSENZA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

FRANK E. FLYNN,
United States Attorney,
District of Arizona

E. R. THURMAN,
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McGREW PRINTERY, PHOENIX, ARIZONA

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TABLE OF CONTENTS

CITATIONS

Cases

TABLE OF CONTENTS—Continued

STATUTES

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JURISDICTIONAL MATTERS

Appellant in his brief has correctly stated the jurisdictional matters and Appellee agrees that the District Court has jurisdiction under Title 18, U.S.C., Section 3231 and that this court has jurisdiction under Title 28, U.S.C., Section 1291.

STATEMENT OF FACTS

Appellant was indicted on two counts. The first count charged that in Phoenix, Arizona, he unlawfully received from one George Henry Booth certain jewelry of an approximate value of TWENTY FIVE THOUSAND dollars ($25,000.00), which had been stolen in Oklahoma City, Oklahoma, knowing that said jewelry had been stolen as aforesaid, and was then and there in "interstate commerce," in violation of Title 18, U.S.C., Section 2315. (T.R. 3).

The second count charged that he knew that the said Booth had transported in interstate commerce the stolen jewelry with actual knowledge of the commission of said felony and further charged that the Appellant did, on or about the first day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible in said State and District, make known the same to a judge or other person in the civil or military authority in the United States of America, in violation of Title 18, U.S.C., Section 4. (T.R. 3 & 4).

Appellant was tried before a jury and at the close of the evidence moved for a judgment of acquittal on the grounds that the evidence was insufficient to justify a verdict of guilty on either count. (T.R. 195). The motion was denied. (T.R. 195). The case was given to the jury and returned a verdict of guilty. (T.R. 11).

The government's case rested on the testimony of witnesses, George Henry Booth, Fred Nichols and Vincent E. Cook. Booth, who had done quite well as a burglar (T.R. 76), met the Appellant sometime in 1947 or early in 1948 (T.R. 30), and saw him off and on until the latter part of August, 1949, and that during that period of time, Booth was associated with the Appellant in selling liquor licenses (T.R. 31). Booth testified that in August or September (T.R. 32) he told Appellant he was planning on going to the East in order to see if he could pick up some jewelry, burglarize some places and get some jewelry, and asked the Appellant if he thought he might be able to get rid of it and he said that he could, "If I could get anything worth while." And he further testified that in the same conversation (T.R. 34), that he told the Appellant that

he was planning on going to the East to see if he could get some jewelry, and if the Appellant could handle it, just like the Appellant always told me; and the Appellant said, "Any time you get anything, I can help you get rid of it, I can help you merchandise it."

In September, Booth went to Oklahoma City, stole some jewelry, (T.R. 36), returned to Phoenix in October and told the Appellant that he had fifty or sixty thousand dollars worth of jewelry. (T.R. 41). Appellant replied, "I have some men in mind, some parties in mind, and if you want to sell it," he says, "we could make a deal on it." (T.R. 41). At that time Appellant asked Booth what his commission would be. Booth further testified that the Appellant told him that he had made arrangements to show the jewelry to a fellow by the name of Skipper, and Appellant wanted to know when Booth could get the jewelry and they made arrangements as to where to meet so that the Appellant could see the jewelry, (T.R. 42), and that the Appellant did meet him at the designated place and looked over all the jewelry and picked out certain pieces which he wanted to show. Booth further testified that after he left Oklahoma he was coming back to see Cosenza to see if they could merchandise it. (T.R. 39). That on or about December 1, Booth met Appellant and the two went to Skipper's Bar in Phoenix to show the jewelry to Mr. Hooper. The jewelry was carried by Appellant because Booth did not want anything to do with the stuff. (T.R. 42). At Skipper's the Appellant, leaving Booth in the barroom, went to Hooper's office in the rear, displayed the jewelry to Hooper and then called Booth in. There was no deal. (T.R. 43-46). Appellant put the jewelry in his pocket and he and Booth went to the Appellant's car which was in a parking lot, and Appellant drove back to where Booth's car was

parked in the vicinity of 17th and that during the ride from Skipper's to where Booth's car was, Appellant had the jewelry in his pocket and he gave it back to Booth when Booth left Appellant's car to get into his own car. Booth further testified (T.R. 49) that shortly after the first visit with Appellant, he took Booth out to South Central and mentioned some fellow's name that was talking to the Appellant about the jewelry; and he took Booth out to talk to the fellow and the fellow wasn't interested and Appellant mentioned he had some more in mind, and that Booth wouldn't let him have the jewelry for Appellant wanted to take it to be used as a sample and Booth did not care for that. (T.R. 49). That Booth took the said jewelry along with other jewelry that he had obtained from Oklahoma City, through Arizona, California and Nevada, (T.R. 51), and finally buried it near Reno, Nevada. (T.R. 50). Booth was apprehended in Reno and pleaded guilty to interstate transportation of stolen property. (T.R. 52).

Witness Fred Nichols, the police officer of the City of Phoenix, Arizona, testified (T.R. 90-91) that he asked Appellant if he knew George Booth, and the Appellant said he did not know Booth, but when presented with a picture of Booth, Appellant then admitted he did know Booth; and Appellant admitted being in company with Booth at the time the jewelry was taken to Skipper's Bar *and that they had taken the jewelry there,* but that Appellant did not know it was stolen nor had any idea it was "hot." (Italics ours.)

Witness Vincent E. Cook, the bartender at Skipper's Bar testified (T.R. 97-98) that about the first of December, 1949, he first saw Booth in the cocktail lounge alone and that he saw Appellant walk through the place

and into the office, which is in the rear of the bar and at that time Booth was still in a booth in the cocktail lounge. (T.R. 98). He further testified, on cross-examination (T.R. 104) that Appellant went into the office first. Appellant categorically denied the testimony of witnesses George Henry Booth and Fred Nichols (T.R. 117-122, 127, 136 and 137), with the exception that he did see the jewelry in Skipper's office, (T.R. 128 and 136).

ISSUES INVOLVED

The issues involved on this appeal relating to the first count of the indictment are:

1. Is the evidence sufficient to sustain the verdict and judgment?

This issue is based upon a motion for judgment of acquittal made by Appellant at the close of the evidence. (T.R. 195).

2. The lower court, in charging the jury, failed to give an instruction on the most essential element constituting a crime for which Appellant was found guilty. (T.R. 198).

3. The third issue involved relates to the second count of the indictment and is based upon a motion for a judgment of acquittal, (T.R. 195), due to the fact that the evidence was not sufficient to sustain the verdict and judgment.

SPECIFICATIONS OF ERROR

Appellant has set forth the following specifications of error in his brief. (App. B. 5 and 6.)

1. The District Court erred in refusing to grant Appellant's motion for a judgment of acquittal on Count I of the indictment; for the evidence was insufficient to sustain the conviction.

2. The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving and concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce." Though no request for such instruction was made, by Appellant, failure to give such instruction constitutes such a fundamental and prejudicial error that this court will take judicial notice of it.

3. The District Court erred in refusing to grant Appellant's motion for judgment of acquittal on Count II of the indictment; for the evidence was insufficient to sustain the verdict.

SUMMARY OF ARGUMENT

In answering Appellant's arguments, we will discuss the points raised in the order in which they are presented in Appellant's brief.

SPECIFICATION OF ERROR NO. I.
(App. B. 5 to 10)

This specification of error has to do with the sufficiency of the evidence to sustain the conviction of Appellant on Count I of the indictment in that there was no evidence to show that the goods were a part of interstate commerce when received by Appellant.

Appellant in his brief, pages 6 and 7, asks the question — when the Appellant received the articles of jewelry were they moving as, a part of, or did they constitute interstate commerce? And then answers his own question by stating that there is no evidence upon which the jury could answer the question in the affirmative. Appellee believes that Appellant has over-

looked some salient facts that are most persuasive in favor of Appellee's position that the evidence was sufficient to show the jewelry constituted interstate commerce at the time Appellant took possession of it from Booth, (T.R. 42-43), and carried it to Skipper's Bar and there with Booth displayed it to Robert S. Hooper (T.R. 46), and thereafter Appellant carried the jewelry out of Skipper's Bar (T.R. 47) and subsequently returned it to Booth when they reached 17th, the place where Booth's car was parked. (T.R. 48).

There can be no doubt that Booth obtained the jewelry by means of burglaries in Oklahoma and transported it in interstate commerce from there to Phoenix, Arizona, with the specific intent of delivering it to Appellant for merchandising, (T.R. 39), and therefore the jewelry constituted interstate commerce up until on or about the first day of December, 1949, when it was delivered to Appellant at which time he took it to Skipper's Bar in Phoenix, Arizona; then and only then can it be maintained that the jewelry ceased to constitute interstate commerce.

Appellee believes that the following cases sustain the position of the government on this point:

McNalley v. *Hill*—69 Fed. 2nd 38 (3rd Cir.)

This case sustains the position of Appellee for it holds that where a sale of a stolen automobile is the last step of interstate transportation in furtherance of a scheme unlawfully to dispose thereof, the sale partakes of "interstate commerce" character, giving federal courts jurisdiction to try the offense though vehicle has come to rest before sale. This case arose under Section 4 of Title 18, U.S.C., Section 408, now 18 U.S.C.A., Section 2313. The reasoning upon which the court bases its decision is found under syllabus 2, page 40 of the opinion and we quote:

"Looking at the subject matter of the statute, it is certain there comes a time in the transportation of a stolen motor vehicle from one state to another when, reaching its journey's end, the motor vehicle stops and transportation ceases. If, at that moment, it loses its quality of "moving as" or "which is a part of" or "which constitutes" interstate commerce, then always would it be impossible to enforce the 4th Section of the statute against the concealment or sale of a car so described. Plainly the statute contemplates a situation where the sale is an incident to something that has gone before, the "final step" of several that have preceded it, such as theft and transportation, and when the sale is so tied up with the interstate transportation in furtherance of the scheme unlawfully to dispose of the stolen vehicle and constitutes the last step thereof, the characteristic of interstate commerce is preserved and the federal jurisdiction for trying the offense of sale is maintained. Section 4.

"This must be true, for the Congress meant something by prescribing as an offense the sale of a stolen motor vehicle which is impressed with the characteristic of interstate commerce. Manifestly it did not, by the 4th Section of the Act dealing with sale of an unlawfully transported motor vehicle, intend the absurd thing of denouncing a sale only when the wheels of the vehicle are turning in interstate transportation. Forbiding the sale of a stolen vehicle only when actually in transit or in motion or in flight is not sense. The Congress intended a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain "a part of" it. When an indictment and the proofs show such to be the fact, the statute gives jurisdiction to a federal District Court to try the case and punish the offender, not exclusively in the jurisdiction where the transaction was completed by sale, or in the

> jurisdiction in which it had its inception by theft, but 'in any district in or through which such motor vehicle has been transported.' "

The facts of the instant case clearly fall within the purview of *McNally* v. *Hill,* supra, for the delivery of the jewelry by Booth to Cosenza for merchandising was a part of the scheme from the inception and was the final step of the several elements of the crime that preceded the turning over of the jewelry to Cosenza in Phoenix, Arizona, for disposal. The Appellant cites in his brief, pages 8 and 9, *Davidson* v. *United States,* 61 Fed. 2nd 250, which considers the situation wherein a car was stolen in Oklahoma and driven to Kansas City, Missouri, and stored for a few days, and then delivered to the defendants Brommel and Davidson. They were charged with and convicted of illegally receiving the car under Title 18, U.S.C., Section 2313, which reads as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be * * *" punished.

From the reading of the last mentioned statute it is obvious that it is similar to said Title 18, U.S.C., 2315, under which the Appellant was prosecuted and convicted.

The Court of Appeals in reversing the case held, on page 255 of its opinion, that because the government failed to produce evidence indicating that the destination was Brommel and Davidson, and that the interstate character ceased when it was stored, we can then logically infer from the opinion that had the evidence pointed to the fact, that had the car been stolen and

transported in interstate commerce with its destination Brommel and Davidson, the judgment would have been affirmed.

In reading the Davidson case, supra, in the light of the facts in this appeal it is obvious that the testimony of the government was ample upon which the jury could answer the question under consideration in the affirmative as it did.

It is the position of Appellee that temporary interruption does not take a shipment out of interstate commerce, and in support thereof, Appellee cites the case of

United States v. *Gollin,* 166 Fed. 2nd 123

at page 125 thereof, where the court cites *Hughes Bros.* v. *Minnesota,* 272 U.S. 469, at page 476, and quotes from that opinion as follows:

> "The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation
>
> * * *. And the temporary stoppage of commerce on its way to the ultimate customer does not destroy the interstate commerce movement."

Other cases so holding are:

United States v. *General Motors,* 121 Fed. 2nd 376 at 401. (7th Cir.)

Local 167 v. *United States,* 291 U. S. 293 at 297

Appellant in his argument on this point cites the case of

McAdams v. *United States,* (8th Cir.) 1934, 74 Fed. 2nd 37

but Appellee does not see that it is applicable for the reason that it is based upon the refusal of the court to give an instruction requested by Appellant in that case, and for that reason it is not in point in any issue under Appellant's Argument No. I.

Appellant also cites in his brief, page 9, the cases of

Hill v. *Sanford,* (5th Cir.) 131 Fed. 2nd 417
United States v. *Gardner* (7th Cir.) 171 Fed. 2nd, 753

Cox v. *United States,* (8th Cir.) 96 Fed. 2nd, 41.

The case of *Hill* v. *Sanford* is not in point for it was presented upon a collateral attack on the sentences by habeas corpus and decides no issue appertaining to Appellant's Argument No. I.

A reading of the case *United States* v. *Gardner* will show the appellate court was correct in reversing the judgment of a lower court for it is obvious there was not sufficient evidence upon which the defendant could be connected with the crime and serves no useful purpose in determining any issue on this issue.

The case of *Cox* v. *United States* is of no help for the evidence failed to show that the car in question was stolen, and the court rightfully set aside the judgment of the lower court.

Certainly there can be no question in the instant case that the jewelry was stolen in Oklahoma and transported to Phoenix, Arizona, for the specific purpose of delivery to the Appellant. Appellant contends (T.R. 156) that at no time did he ever engage in any law violation with Booth. However, Appellee contends that the relationship existing between Booth and Appellant in the sale of liquor licenses (T.R. 31 and T.R.

118), and in the disposal of zircons precludes ignorance of each other's resources and compels a finding of guilty knowledge on the part of the Appellant with respect to the jewelry in question.

Appellee believes that the testimony is ample to sustain the allegations of its first count of the indictment and that the court did not err in denying Appellant's motion for a judgment of acquittal on Count I of the indictment.

SPECIFICATION OF ERROR NO. II
(App. B. 5, 10 to 16.)

This specification of error rests upon the theory that the district court erred in failing to instruct the jury that

> "Before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce."

And though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamentally judicial error that this Court will take notice of it.

Under this specification of error Appellant has very carefully and properly set forth most of the instructions of the court appertaining to the first count of the indictment. In order to shorten Appellee's brief we will refer to the instructions as set forth in Appellant's brief on pages 10 and 11 thereof.

However, Appellee believes that the Court's attention should be called to a part of the trial court's instructions found on page 200 of the Transcript of Record, and we quote,

"Now, by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until all the evidence introduced on behalf of the government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged * * *."

In reading the court's instructions it will be found that the court instructed in the language of the statute, in fact, read the statute verbatim, as well as Count I of the indictment, and also read to the jury the statutory definition of "interstate commerce," and then further instructed (T.R. 200) as follows, and we quote,

"A defendant is presumed to be innocent at all stages of the proceedings *until the evidence introduced on behalf of the government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged.*" (Italics ours.)

How much more is required, especially when Appellant did not request that such an instruction be given? Must we assume that the jury collectively were of such mentality that they were unable to understand what the court meant by his instructions, considering that the court read Count I of the indictment which contained the material element of the offense, that the defendent *then and there knew the said jewelry had been stolen and was then and there in interstate commerce?* (Italics ours.)

It was not difficult from the evidence, and the instructions of the court, for the jury to find that the burglar, Booth, intended to carry the stolen jewelry from one state to another in order to dispose of it and

therefore the jewelry was a part of interstate commerce until it was so carefully laid to rest some fourteen miles East of Reno, Nevada, where it remained until it was "dug up" on May 26, 1950. (T.R. 87).

It is hard to conceive how, had the court given the instruction Appellant contends he should have given, the jury would have arrived upon a different verdict from the one they returned.

It is axiomatic that the element of whether or not the jewelry was in interstate commerce at the time Appellant received same from Booth is a fact that had to be presented to the jury for its determination, and this question was submitted to the jury under instructions in the language of the appropriate statutes and the wording of the indictment with no request for a more specific instruction and therefore Appellant has no right to complain in the Appellate court.

Appellee believes that the case of

Baugh v. *United States,* 27 Fed. 2nd 257 (9th Cir.) is in point. This case holds, under syllabus 6, that in a prosecution for receiving and concealing a stolen automobile transported in interstate commerce, and for a conspiracy to commit such crimes, the question of when the car ceased to be in interstate commerce was held for the jury. And we quote from the opinion on page 261 as follows:

> "It is also assigned as error that the court failed to instruct the jury that, to constitute the offense defined by Section 4 of the Vehicle Theft Act, Appellant must have had knowledge, at the time he received the car, that it had been stolen; for, as argued, the vehicle then ceased to be in interstate commerce. The court did repeatedly instruct substantially in the language of the statute, and upon

the record we do not deem it necessary to determine to what extent a proper request would have imposed the duty of amplification. The question when a stolen vehicle which has been transported in violation of Section 3 of the act ceases to be the subject of criminal concealment, as defined in Section 4, is not free from difficulty * * *, and because of the difficulty of formulating a general rule the attempt should await the necessity.

The evidence tending to show that the car was in interstate commerce up to the time Appellant received and stored it, and that he then had knowledge of its having been stolen, was sufficient to require those issues to be submitted to the jury. In defendant's requests for instructions upon the point the court was asked to declare peremptorily that when Appellant received the car it ceased to be in interstate commerce. But under the circumstances in evidence that was clearly a question of fact for the jury. With some plausibility it could be argued that, if Appellant bought the car outright for his own use and had thereupon put it into service, the transaction would have operated to terminate the interstate character; but on the witness stand he stoutly denied that he bought the car at all, asserting that he took it only as security for a loan for $400.00, and that it was subject to redemption by Miller; and in fact he never put it into use."

It must be remembered that the Appellant, Cosenza, in this case took the stand and denied that he had ever had anything to do with the jewelry other than what happened at the Skipper's Bar. The Baugh case, supra, is cited with approval in the opinion of

Parsons v. *United States,* 188 Fed. 2nd 878.

The Parsons case refused to follow the reasoning of *Davidson* v. *United States,* supra, and on page 879 of the opinion states as follows, and we quote,

> "Whatever may have been the state of earlier views, and at some times and places they tended to be consonant with appellant's technical views, it is a long time now since weighty matters of this kind as to law observance and law enforcement have been dealt with, as contended for here, as matters of hair splitting and tithing, mint, anise and cummin."

Appellant on page 14, paragraph 2 of his Specification of Error No. 2 relies upon Rule 52(b) of the Rules of Criminal Procedure which reads,

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Appellee has no fault to find with the rule that where life or liberty is involved, and Appellate courts may notice a serious error which is *plainly* prejudicial even though it was not called to the attention of the trial court. (Italics ours.)

The government does not believe that the case now before the Court falls within the category of the cases cited by Appellant under this point; for to say that the trial court committed a *plain* error, in not instructing the jury as Appellant claims it should have, would be giving credence to a mere afterthought of Appellant, especially when there was no request for any such charge.

In fact, the position of Appellant falls within the language and thought of Mr. Justice Frankfurter in his concurring opinion in the case of

Johnson v. *United States,* 318 U.S. 189

and we quote from the pertinent parts thereof commencing at page 202 as follows:

"In reviewing criminal cases, it is particularly important for Appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiese in low standards of criminal prosecution * * *. That the defendant's senior counsel, a lawyer of long experience in federal criminal practice, did not take exception to the manner in which Judge Maris tempered concern for the proper administration of justice with solicitude for the rights of the defendant, indicates not "waiver" of a right which had been denied but recognition that the action of the trial judge was unexceptionable. The claim that the trial was conducted improperly is obviously an afterthought. Only after conviction and in an effort to upset the jury's verdict on appeal was the fair conduct of the trial court sought to be distorted into an impropriety."

Appellee in support of its contention that the Appellant has no right to complain in the Appellate court cites Rule 30, Instructions, Title 18 Federal Rules of Criminal Procedure at page 309. Rule 30, Instruction,

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his

objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Appellee in support of its premise on this matter cites the following cases which hold that an instruction must be excepted to before the case is submitted to the jury in order to be available on appeal.

Jackson v. *United States,* 179 Fed. 2nd 842, (6th Cir.)

Ziegler v. *United States,* 174 Fed. 2nd 439, (9th Cir.)

Bloch v. *United States,* 261 Fed. 321 (5th Cir.)
Shockley v. *United States,* 166 Fed. 2nd 704 at 718, (9th Cir.)

Goldstein v. *United States,* 73 Fed. 2nd 804, (9th Cir.)

Nemec v. *United States,* 178 Fed. 2nd 656, (9th Cir.)

Fredrick v. *United States,* 163 Fed. 2nd 536, (9th Cir.)

The last mentioned case on page 549 of the opinion under syllabus 18 states that it has long been the settled rule in federal courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal; and further holds that this is no merely technical requirement, but is founded upon reason, justice and expediency, and if the error is seasonably called to the court's attention, the court can correct it forthwith and thus obviate the necessity of a new trial.

Appellee contends that there was no *plain* or other error committed on the part of the trial court under its instructions to the jury on Count I of the indictment. (Italics ours.)

SPECIFICATION OF ERROR NO. III.
(App. B. 16 to 22)

Appellant maintains under this specification of error that the court erred in refusing to grant Appellant's motion for judgment of acquittal on Count II of the indictment; for the evidence was insufficient to sustain the verdict.

Appellant under "C" and "C-1" contends that there was no evidence to prove that the Appellant knew a federal offense had been committed or no evidence to show that accused actively concealed the crime.

To answer these arguments it would be necessary to again review the bulk of the testimony, but Appellee, from what has been pointed out in its brief on Specifications of Error Nos. I and II, deems it not necessary, and in closing on these two points claims that the evidence is ample to show beyond a reasonable doubt that Appellant not only knew a federal crime had been committed but actually encouraged and supported the theft of the jewelry in Oklahoma and its transportation to Phoenix, Arizona, for disposal.

The Appellant was charged in Count II of the indictment of violating 18 U.S.C. 4. Count II of the indictment reads,

> "That on or about the 1st day of October, 1949, in the State and District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18, U.S.C. 2314, a felony cognizable by a court of the United States, in that the said George Henry Booth did on or about the said 1st day of October, 1949, transport and cause to be transported in interstate commerce, at one time, certain theretofore stolen jewelry, to-wit, one platinum bracelet set with diamonds, two diamond studded

watches and one diamond-platinum pin, all being in the approximate value of $25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid; that Raoul A. Cosenza, defendant herein, having actual knowledge of the commission of said felony as above set forth, did, on or about the 1st day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America."

Title 18, U.S.C. 4, reads as follows:

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500.00 or imprisoned not more than three years, or both."

In said Count II the Appellant is charged with having knowledge of a violation of Title 18, U.S.C. Section 2314, which reads in part as follows:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of $5,000.00 or more, knowing the same to have been stolen * * * shall be fined not more than $10,000.00 or imprisoned not more than 10 years, or both."

Appellant on page 18 of his brief, 2, states that an accused cannot be found guilty of misprision of felony unless he committed positive acts, concealed the crime or misleads government authorities. Under this head-

ing Appellant claims that he has been unable to find any cases in which the conviction for the violation of 18 U.S.C. Par. 4, as a substantive offense, has ever been upheld by an Appellate court. He further maintains that this is a surprising fact situation on account of the long period of time that the statute has been on the books in its present form.

The reason why the statute has not been more frequently used is not a matter for this court and we can only keep in mind that it is still on the statute books and a serious federal offense.

Appellant cites the case of the *United States* v. *Farrar,* 38 Fed. 2nd 515, in support of his position. We have no quarrel with that case for it states the correct rule and we do not disagree with the court wherein it held that there is a requirement that both concealment and failure to disclose are necessary elements in the proof of a violation of misprision of felony. In the Farrar case the defendant did nothing to conceal the crime or take any part in the concealment of the crime. They merely kept silent.

Appellant also cites the case of *Bratton* v. *United States,* 73 Fed. 2nd 795. The basis for decision in this particular case was that there was no effort on the part of the defendant to conceal the crime. They merely kept silent.

Appellant on page 21 of his brief cites the case of *Neal* v. *United States,* 102 Fed. 2nd 643, and therein states that the following facts were before the court:

> "John Neal, defendant's brother, stole more than $100,000.00 from a national bank over a period of years. John invested sums of money in the defendant's business, the sums being greatly in excess of his income. John then disappeared. The de-

fendant aided in concealing him, "threw dust" into the eyes of the federal authorities, had books of accounts altered so that it would not show John's investments, and hid from the officers some $6,000.00 of John's money. The court held that this was not sufficient upon which to base a conviction on the misprision of felony statute."

The court did have those facts before it, but in reading the opinion of the court in the Neal case, at page 645, it will be found that in the second Count of the indictment it was alleged that on or about January 7, 1938, the defendant had committed the crime of misprision of felony in that with full knowledge of the felony committed by John L. Neal, he concealed and failed to disclose and make known such felony as soon as might be to some of the judges of the United States District Court of Minnesota, or to the Attorney General of the United States or to the United States Attorneys or to other persons in civil authority. It is further charged that the defendant took two affirmative steps to conceal the crime committed by his brother John; first, he concealed $5,903.00 of the stolen money in a golf bag at his living quarters; and, second, he altered and expunged from the account books of the Neal Funeral Home operated by him, entries showing the investment therein by John L. Neal of the stolen monies. On page 647 of the opinion we find this language:

"The proof does not show when the $5,903.00 was placed in the old iron box by John. John's salary was only $140.00 a month. Over a period of seven years he stole approximately $118,000.00. During 1937 he stole $53,000.00 of this sum, and after August 24th, of that year he had taken approximately $18,000.00 of the amount. The money stolen prior to August 24, 1937, did not constitute a federal offense, and the stealing of money prior to that date, is not charged to be a crime in the indictment.

The defendant's testimony is that when he opened the iron box on December 28, 1937, the paper money contained in it appeared to be old and was covered with a thick layer of dust. Early in January, 1938, the money was turned over to the officers, and they do not deny defendant's testimony in reference to its condition. The money consisted of 813 one-dollar bills and $5,090.00 of five, ten, twenty and fifty dollar bills."

At the bottom of page 649 of the opinion we find this language and we quote,

"We next consider the charge in the indictment that the defendant did two affirmative acts to "conceal" the crime of the principal. The first act charged was that he concealed $5,903.00 in a golf bag, "which moneys unlawfully and feloniously had been taken and carried away by the said John L. Neal, with intent to steal the same, from the possession of" the bank; and, second, that he knowingly altered and expunged from the books of account of the Neal Funeral Home entries showing * * *" John L. Neal's investment of the stolen moneys in that business. "There are only two entries in the books showing investments of John L. Neal in the funeral business after August 24, 1937. One of these shows that on October 15, 1937, he "advanced" $125.00 and the other that on October 19th, he "advanced" the further sum of $100.00. There is no evidence whatever connecting these sums with the money unlawfully taken and carried away from the bank; and the amount is not sufficient to raise a presumption of fact that they were not honest savings from his salary."

It is obvious from reading the Neal case that the reasons for the court's decision was the fact that there was no proof that the said sum of $5,903.00 was a part of the actual money stolen from the bank by John L. Neal, neither was there evidence to show that the items

expunged from the books of the funeral business was a part of the stolen money.

Certainly the Neal case is no help to Appellant when the facts in that case are read in the light of the evidence in the instant case with respect to Count II of the indictment.

In this case now on appeal before this honorable court there is sufficient evidence to prove that the Appellant not only knew that Booth was going to go East to commit burglaries to obtain jewelry and bring it back to Phoenix, Arizona, so Appellant could help dispose of it; especially when Appellant told Booth that he would help him merchandise it providing Booth obtained anything worth while and the further fact that Appellant carried the jewelry to Skipper's Bar in Phoenix, Arizona, where it was displayed, not in the open, but in a back office.

If the jury believed the testimony of Booth and the other government witnesses, which they undoubtedly did, it seems absurd to ask this court to set aside the verdict of the jury and the judgment of the court on Count II of the indictment.

Had Appellant notified the proper authorities of the crime committed by Booth he would not have been charged with the crime of misprision of felony.

SUMMARY

1. The court did not err in denying Appellant's motion for a judgment of acquittal on Count I of the indictment.
2. The court did not err in its instructions to the jury.
3. The court did not err in denying Appellant's motion for a judgment of acquittal on Count II of the indictment.
4. Appellant had a fair and impartial trial and the verdict and judgments should be affirmed.

Respectfully submitted,

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